IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 8249

G. W. BURLEY, ET AL.,
Plaintiffs-Appellants,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,
HONORABLE JOHN P. BARNES, TRIAL JUDGE.

Petition for Rehearing.

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Petition for Rehearing.

Elgin, Joliet and Eastern Railway Company petitions this Court for a rehearing. Your petitioner requests also that oral argument be granted before the matters set forth in this petition shall be determined.

Your petitioner respectfully represents that certain points and authorities set forth in its brief filed herein have been overlooked or misapprehended.

The question of agency in this case was considered
the Court as a question arising at common law. This w
an error. The agency question cannot be considered apa
from the provisions of the Railway Labor Act. This A
was not considered by the Court in the decision hand
down on November 10, 1943. The issues before this Cou
necessarily involve a construction of that Act and t
effect of the award for the defendant made by the admini
trative Board created by that Act.

Whether the District Court correctly entered summa
judgment for the defendant depends upon whether t
award of the Adjustment Board is final and binding. T
District Court found that the award for the defenda
was final and binding *as a matter of law.* That findi
was the *ratio decidendi* of its opinion. This Court d
not pass upon the issue. If the award of the Adjustme
Board is final and binding, the District Court correct
entered summary judgment for the defendant and th
judgment should have been affirmed by this Court.

I.

The Award of the Adjustment Board Is Final and Bindi

On pages 16 and 45 of your petitioner's brief and arg
ment, there is set forth the point that the award render
by the Adjustment Board on September 6, 1940 in fav
of the defendant is final and binding upon the plainti
in the case at bar. This award (Supp. Tr., 26-39),
Docket 7324, in part found (Supp. Tr., 39) that

> "The evidence shows that the parties to the agr
> ment disposed of the claim here made by the lett
> of the carrier, dated October 28, 1938, accepted
> the employees October 31, 1938.
>
> Award.
>
> Claim denied per Findings."

Section 153 (m) of the Railway Labor Act (45 USCA) provides that

> "the award shall be final and binding upon both parties to the dispute."

As stated on page 48 of your petitioner's brief, authority of the General Chairman of the Grievance Committee to file a complaint before the Adjustment Board in the name of "Brotherhood of Railroad Trainmen" alleging that the defendant violated Article 6 of its labor agreement and claiming for the plaintiffs (among others)

> "one day's pay at time and one-half for . . . each day they were required to work in yard service in the Whiting (Standard Oil Company) yard . . . from the dates of August 27, 1934 until November 14, 1938, inclusive." (Supp. Tr. 26)

is implied because of the very nature of his office and functions in the Brotherhood. All plaintiffs in the case at bar were members of the Brotherhood. (Brief p. 3, Supp. Tr. p. 4.)

The General Chairman of the Grievance Committee of the Brotherhood of Railroad Trainmen, as pointed out on page 48 of your petitioner's brief, had been designated by the plaintiffs as their "representative" to act for them in the presentation of their claim before the defendant and later before the Adjustment Board relating to the alleged violation of Article 6 of the labor agreement. These facts are not denied by plaintiffs. The fact that the second claim filed before the Adjustment Board sought to obtain additional pay at time and one-half for each day worked between August 27, 1934 and November 14, 1938, and that the first claim filed before the Adjustment Board sought only to compel the defendant to comply with the provisions of Article 6 of the labor agreement is immaterial so far as this Court is concerned. This Court is bound by the adjudication of the Adjustment Board deny-

ing the second claim. *Washington Terminal Co.* v. *Boswell,* 124 F. 2d 235; brief p. 51.

Congress has provided specifically for *limited* court review in certain types of disputes arising out of agreements between railroads and labor organizations. *Washington Terminal Co.* v. *Boswell,* 124 F. 2d 235, affirmed, 63 S. Ct. 1430; brief, pp. 16, 17, 18, 51, 57. Congress has not given to courts power to decide jurisdictional controversies between unions and a railroad. *Switchmans Union of North America* v. *National Mediation Board, et al; General Committee of Brotherhood of Locomotive Engineers* v. *M. K. T. R.R. Co.; General Committee of Brotherhood of Locomotive Engineers* v. *Southern Pacific Co., et al,* all decided by the Supreme Court of the United States, November 22, 1943. (See also brief, Point IV B, p. 53.)

In the latter case, the Court stated:

> "It seems to us plain that when Congress came to the question of these jurisdictional disputes it chose not to leave their solutions to the courts.
>
> "To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board . . . The conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability . . . Courts should not rush in where Congress has not chosen to tread."

In the three opinions handed down November 22, 1943, the Supreme Court decided that in the absence of specific provisions for judicial review, jurisdictional disputes between labor unions and a railroad should be decided by

ne Mediation Board established by the Railway Labor ct and that courts have no power to decide such contro- ersies. The same reasoning applies to awards of the djustment Board created by the same Act.

There is no provision in the Railway Labor Act by which he award of the Board denying the claim of the plaintiffs n the case at bar might be reviewed by this Court. In he absence of such a provision, this Court has no power o review the award. The plaintiffs in the case at bar re seeking Court review of their claims, a right denied hem by the Railway Labor Act. The award of the Board hould be given the legal effect directed by Congress—that s, the award "shall be final and binding upon both par- ies to the dispute" and *upon this Court.*

The award also contains findings of fact (Supp. Tr., 39) as follows:

> "The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.
>
> "This Division of the Adjustment Board has jurisdiction over the dispute involved herein.
>
> "The parties to said dispute were given due notice of hearing thereon."

These findings of fact by the administrative agency satisfied the District Court and should satisfy this Court that the elementary requiremnets of due process, jurisdiction of the dispute and notice to the parties and an opportunity to be heard, so far as the plaintiffs in the case at bar are concerned, were complied with by the administrative agency. This Court is bound by such findings of fact.

When the Adjustment Board handed down its award in the second complaint filed by the Brotherhood in this case denying the claim in accordance with the findings

of fact, this Court was ousted of its jurisdiction because the award of the Board was final and binding. The Chairman of the Grievance Committee of the Brotherhood originally could have filed suit for alleged back wages due in accordance with the alleged custom either in a court of law or before the Adjustment Board. (*Moore* v. *Illinois Central*, 312 U.S. 630, brief, pages 36, 50.) When the privilege was exercised by the "designated representative" of the plaintiffs and a claim was filed before the Adjustment Board and the Adjustment Board denied the claim in accordance with the finding of facts, that award of the Adjustment Board has a legal effect binding upon this Court. (*Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235, 244; brief page 52.) In other words, the award of the Adjustment Board is final and binding and this Court cannot ignore the legal consequences of the award by considering this case as one arising as at common law. The question of common law agency is not a justiciable controversy in this case.

II.

The Opinion of This Court Conflicts with Other Federal Court Decisions.

The decision of this Court conflicts with the opinion in the case of *Division 525, Order of Railway Conductors of America* v. *Gorman, et al*, 133 F. 2d 273, CCA 8, 1943; brief, p. 49. This case held that the defendant cannot be required to examine into the specific authority granted the "designated representative" of the Order when entering into a collective bargaining agreement.

The same reasoning applies when the "designated representative" of the Brotherhood and of the plaintiffs in the case at bar made the compromise agreement and presented the claim before the Adjustment Board. The

defendant cannot be required to determine, as the opinion of this Court directs, whether the claim filed in the name of the Brotherhood of Railroad Trainmen by the Chairman of the General Grievance Committee of the Brotherhood was specifically authorized by the plaintiffs. This requirement, as the defendant points out on page 48 of its brief, would destroy collective bargaining made mandatory by the Railway Labor Act. If the Chairman of the Grievance Committee was the "designated representative" of the Brotherhood of Railroad Trainmen and authorized to confer with the defendant, then the defendant is *compelled* (45 USCA sec. 152, second) to "consider" and, if possible, "decide" all disputes. Vagaries of the rules of common law agency need not be considered by the defendant.

If the petition for rehearing in this case is not granted and if your petitioner is required in every case of collective bargaining to determine whether the Chairman of the Grievance Committee of the Brotherhood of Railroad Trainmen has been actually authorized to make the particular agreement concluded, the defendant will be required to obtain specific authority from its thousands of employees in Indiana and in Illinois before it can begin negotiations with the "designated representative." The problem would be even more complex for transcontinental railroads having employees in many states.

If the authority of the "designated representatives" of the employees "to negotiate, compromise and settle plaintiff's claim for damages for the violation of Article 6" is considered as a matter of agency at common law, requiring the defendant to demand strict proof of the agency from all of the employees involved, in this case from all of the plaintiffs and others, collective bargaining will break down. (Brief, pages 32, 33.) Such proof necessarily would be of a nature to satisfy a jury by a preponderance of the evidence or a court as a matter of law that the

"designated representative" was authorized to perform every particular act and enter into every particular agreement consummated. Such requirement, as a practical measure, would result in industrial strife, "interruption to commerce or to the operation" of railroads and bring about the very conditions which the Railway Labor Act sought to prevent.

Nevertheless, such must be the policy of this defendant if this petition for rehearing is not granted. No other course of safe procedure is permitted by the decision handed down by this Court on November 10, 1943. Such detailed requirements would destroy the provisions of the Railway Labor Act and thus nullify the expressed compulsion of Congress that railroads settle disputes with "designated representatives" of labor organizations, either by compromise agreement or by disposition of the Adjustment Board. (Brief, page 32.)

Greater confusion would result with reference to claims filed before the Adjustment Board. This defendant and all railroads, if this petition for rehearing is not granted, will be required to examine into the specific authority of the "designated representative" or proceed at their peril. Frequently claims involve many employees, as in the case at bar. The opinion of this Court requires that the specific authority of the "designated representative" to file a claim before the Adjustment Board for each employee he claims to represent must be shown in a manner to satisfy the common-law rules of agency. Neither the defendant nor any other railroad can follow the decision of this Court and the requirement of the Railway Labor Act to "settle all disputes," if possible, *promptly* with the "designated representative" of the employees, if the opinion of this Court is not reconsidered on rehearing.

The Railway Labor Act merely requires that "failing to reach an adjustment", "the disputes may be referred . . . by either party" to the Adjustment Board, whose

"awards shall be final and binding upon both parties to the dispute." 45 USCA, sec. 153 (i), (m). The opinion of this Court renders these provisionss of the statute nugatory.

This Court overlooked also the case of *Smith et al* v. *Texas & N. O. R. Co.* (32 F. Supp. 1013, 118 F. 2d 75, CCA 5; brief pages 13, 14, 15, 17, 33, 37) and the case of *System Federation* v. *Louisiana Ry. Co.* (30 F. Supp. 909, 119 F. 2d 509, CCA 5; brief pages 50, 51). In the *Smith* case the employee died six months *before* the execution of the compromise agreement allowing "back wages." If rules of common law agency were applicable, the death of the employee revoked the agency and his children would not have been bound by the provisions of the compromise agreement made by the "designated representatives" during collective bargaining negotiations. The Circuit Court of Appeals, however, held that his children were bound by the agreement. In the *System Federation* case the Circuit Court of Appeals held that "any and all claims for damages" were cancelled by the collective bargaining agreement. Common-law agency rules were not applicable. The same reasoning was applied with approval of the Supreme Court of the U. S. in the case of *Evans et al* v. *Johnson et al* (300 Ill. App. 78, 20 N. E. 2d 841, cert. denied 309 U. S. 662; brief, page 39), overlooked also by the Court in its opinion of November 10, 1943.

III.

Rules and By-Laws of the Brotherhood Authorized the Compromise Settlement and the Filing of the Claim Before The Adjustment Board.

The Court in its opinion overlooked the rules and by-laws of the Brotherhood, part of the record before the Court. Rule No. 10 in part provides (brief, page 41) "whatever action may be taken by the General Grievance Committee

• • • shall be law to the Lodges • • • and if any member refuses to • • • abide by the action of such General Grievance Committee • • • he shall be expelled from the Brotherhood for violation of obligation."

This rule alone gave the General Chairman and Secretary of the General Grievance Committee of the Brotherhood power to make the compromise agreement of October 31, 1938, and to file the claim before the Adjustment Board.

CONCLUSION.

The plain direction of Congress that the award of the Adjustment Board denying the claim of the Brotherhood for damages for past violations of Article 6 should be "final and binding" upon the plaintiffs in the case at bar was overlooked by the Court in handing down its opinion of November 10, 1943. Admitting that the complaint states a cause of action at common law, the question of the effect of the award upon the rights of the plaintiffs to recover remains unanswered by this Court. Reference to the authority of the agent to bind the plaintiffs not only begs the question but also violates the policy which Congress in the Railway Labor Act provided as paramount.

Whether the award of the Adjustment Board is "final and binding" does not depend upon the niceties of the law of agency. The only question presented to this Court for adjudication, as far as the finality of the award is concerned, is whether the dispute was "referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts" as required by Section 3(i) of the Railway Labor Act, whether the "parties" were heard by their "representatives" and given "due notice" as required by the following paragraph (j), whether "findings" were made in the "final award" as provided in paragraph (k), whether a referee

was chosen as provided in paragraph (l) and whether a "copy of the award" was "furnished to the respective parties to the controversy" as provided in paragraph (m). If these requirements have been met—and plaintiffs admit that they have—then the "award" of the Board "shall be final and binding upon both parties to the dispute" as provided in paragraph (m).

This presents no jury question. Thus, the summary judgment entered by the District Court was correct. It should be affirmed by this Court upon rehearing.

The plaintiffs have had their day. This Court should not give them another. To do so violates the Railway Labor Act and ignores the mandate of Congress. The plaintiffs are prohibited from doing by indirection what the Railway Labor Act denies them to do directly—that is, have a court adjudication after the Adjustment Board has denied their claim. (*Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235; affirmed, 63 S. Ct. 1430; brief, pages 16, 17, 18, 51, 57.)

Furthermore, the decision of this Court conflicts with other Federal decisions and ignores the rules of the Brotherhood granting power to the General Grievance Committee to make a compromise agreement and to file a claim before the Board for "adjustment," as pointed out in this petition.

Rehearing and oral argument should be granted to decide the issues which this Court has overlooked or misapprehended.

Respectfully submitted,

ELGIN JOLIET AND EASTERN RAILWAY COMPANY,
Defendant-Appellee.

PAUL R. CONAGHAN,
Counsel for Defendant-Appellee.
208 S. La Salle St.,
Chicago, Illinois.

Endorsed: Filed November 26, 1943. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the fourteenth day of March, 1944, the following further proceedings were had and entered of record, to-wit:

Tuesday, March 14, 1944.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.

8249	G. W. Burley, *et al.*, *Plaintiffs-Appellants*, *vs.* Elgin, Joliet and Eastern Railway Company, a Corporation, *Defendant-Appellee.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and it is hereby, denied. Judge Kerner does not concur.

And afterwards, to-wit: On the twenty-second day of March, 1944, the Mandate of this Court issued to the District Court of the United States for the Northern District of Illinois, Eastern Division.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the proceedings had and papers filed, excepting briefs of counsel and motions and orders extending time for filing printed record and briefs, in:

Cause No. 8249

G. W. Burley, *et al.*,
Plaintiffs-Appellants,

vs.

Elgin, Joliet and Eastern Railway Company, a Corp.,
Defendant-Appellee,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of April, A. D. 1944.

Kenneth J. Carrick
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.